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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 713

JOE TENNER,
Petitioner,

vs.

CHARLES W. DULLEA, Chief of Police of the City and County of San Francisco,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the Superior Court of the State of California, in and for the City and County of San Francisco.

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Subject Index

	Page
Summary of Proceedings	1
I.	
This court will not assume jurisdiction for review of the petition on certiorari herein—petitioner has not exhausted his remedy in the court of last resort of this state	3
II.	
It does not sufficiently appear that a federal question was raised in the state court	7
III.	
The application of petitioner for a writ of certiorari does not present a substantial federal question	8
IV.	
The congressional act enabling the states to enter into compacts in the enforcement of their penal laws, and the California statute enacted thereunder, are valid and violate no federal constitutional provision	11
Conclusion	15

Table of Authorities Cited

Cases	Pages
Anthony, Ex parte, 87 Pac. (2d) 302	14
Appleyard v. Massachusetts, 203 U. S. 222	4
Brooks v. United States, 267 U. S. 432	16
Brown v. Lowry, 195 S. E. 759 (Ga.)	15
Burton v. New York Central R.R. Co., 245 U. S. 315	7
Clarke v. McDade, 165 U. S. 169	4, 8
Day v. Keim, 2 Fed. (2d) 966	7
Foster, Ex parte, 61 Pac. (2d) 37	10, 15
Green v. Biddle, 21 U. S. 1	10
Henkel v. Cincinnati, 177 U. S. 170	7
Hinderlider v. La Plata Co., 304 U. S. 93	9
Home for Incurables v. City of New York, 187 U. S. 155	7
Honeyman v. Hanan, 300 U. S. 14	8
Kentucky v. Dennison, 24 How. 66	13, 14
Mahon v. Justice, 127 U. S. 700	14
McBride, In re, 101 Cal. App. 201	15
Miller v. McLaughlin, 281 U. S. 261	13
Mooney v. Holohan, 294 U. S. 103	4
New Jersey v. Delaware, 291 U. S. 361	13
Nielson v. Oregon, 212 U. S. 315	13
People v. Central Railroad, 12 Wall. 455	9
Perkins, Matter of, 2 Cal. 424	5, 8
Roberts v. Reilly, 116 U. S. 80	13
St. Louis and San Francisco Ry. v. James, 161 U. S. 540	9, 13
Seaboard Air Line Ry. v. Duvall, 225 U. S. 477	7
Stallings v. Splain, 253 U. S. 340	7
Sugarman v. United States, 249 U. S. 182	8
Taylor v. Taintor, 83 U. S. 366	14

Pages

United States v. Bekins, 304 U. S. 27 10

Virginia v. Tennessee, 148 U. S. 503 9

Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86 11
Wharton v. Wise, 153 U. S. 155 ..... 9, 13
Whitney v. California, 274 U. S. 357 8

Zany, Matter of, 164 Cal. 724 5
Zucht v. King, 260 U. S. 174 ..... 8, 11

Codes and Statutes

California Constitution, Article VI, sections 1, 4, 4b, 5 5
California Statutes 1937, p. 469 ..... 2, 9

Penal Code, Section 1475 (California Statutes 1907, p. 560) 5, 6

Statutes 1909, Chapter 406 ..... 3, 9, 12
Statutes 1937, p. 469 12

United States Constitution, Article I, Section 10, Clause 3
..... 9, 13, 15
United States Constitution, Article IV, Section 2, Clause 2 3
18 U. S. C. A., section 420 ..... 3, 12
18 U. S. C. A., section 662, R. S. 5278 14
28 U. S. C. A., section 344 (b) 4
U. S. C. A., Part 2, p. 218 13

Texts

134 A. L. Rep. 1411 13

59 Corpus Juris 37, section 13-b 9

Deering's General Laws 1937, Vol. II, p. 2732 ..... 2, 12

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to the Superior Court of the State of California, in and for the City and County of San Francisco.

SUMMARY OF PROCEEDINGS.

Petitioner has filed with this Court an application for a writ of certiorari directed to the Superior Court of the State of California, in and for the City and

*NOTE: All italics are by the writer unless otherwise indicated.

County of San Francisco. The petition springs from an order of remand and refusal of discharge on a petition for a writ of habeas corpus, filed in said Superior Court.

It appears from the return to the writ, petitioner was sentenced to Washington State Penitentiary on March 15, 1938 for the commission of a felony, namely, living with and accepting the earnings of a prostitute, by the courts of said State for a period not exceeding five years; that on March 14, 1940 petitioner was paroled from said institution; that on the 11th day of August, 1941, the Board of Prison Terms and Paroles of said State revoked said parole for cause, ordering the return of petitioner to said State prison; that upon telegraphic instructions from the Chief Parole and Probationer Officer of said State he was taken into custody by the police of San Francisco to await the arrival of officers from the State of Washington to return him to said State. (R. 4, 5.) Petitioner thereupon filed the petition for said writ of habeas corpus from the decision of which this proceeding is taken.

The procedure followed by the authorities of the State of Washington to secure the return of petitioner as a parolee, whose parole had been revoked, is set forth in an interstate compact adopted by the legislature of the State of California in 1937, material paragraphs of which are hereafter quoted. (California Statutes 1937, page 469; Deering's General Laws 1937, Volume II, page 2732.)

This statute was enacted under the authority of the Congressional consent act adopted by Congress June

6, 1934 (Ch. 406, Stats. 1909; U.S.C.A. Title 18, section 420) hereafter set forth.

Petitioner contends the foregoing legislation is in violation of the due process clause and of Article IV,* Section 2, Clause 2 of the Federal Constitution.

It is the contention of respondent that this Court has no jurisdiction to entertain the petition on certiorari because,

(a) Petitioner has not exhausted his remedy in the court of last resort of the State of California;

(b) It does not sufficiently appear a federal question was raised in the State court;

(c) The petition does not present a substantial federal question to this court;

(d) The legislation under which it was sought to return petitioner as a parolee to the State of his conviction and sentence violates no provision or prohibition of the Federal Constitution.

I.

THIS COURT WILL NOT ASSUME JURISDICTION FOR REVIEW OF THE PETITION ON CERTIORARI HEREIN—PETITIONER HAS NOT EXHAUSTED HIS REMEDY IN THE COURT OF LAST RESORT OF THIS STATE.

It has been repeatedly declared by this Court that it will not entertain a petition of the character here disclosed until the petitioner has exhausted whatever remedy he may have in the highest court of the State

*Reference to Article II by petitioner is an apparent error.

in which the proceedings originated, and until such court has acted thereon.

> *Mooney v. Holohan,* 294 U.S. 103, 115:
>
> "We do not find that petitioner has applied to the state court for a writ of *habeas corpus* upon the grounds stated in his petition here. That corrective judicial process has not been invoked and it is not shown to be unavailable. Despite the many proceedings taken on behalf of the petitioner, an application for the prerogative writ now asserted to be peculiarly suited to the circumstances disclosed by his petition has not been made to the state court. Orderly procedure, governed by principles we have repeatedly announced, requires that before this Court is asked to issue a writ of *habeas corpus,* in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the State may still remain open. *Davis v. Burke,* 179 U. S. 399, 402; *Urquhart v. Brown,* 205 U. S. 179, 181, 182; *U. S. ex rel. Kennedy v. Tyler,* 269 U. S. 13, 17. See, also, *Bryant v. Zimmerman,* 278 U. S. 63, 70."

See, also:

> *Appleyard v. Massachusetts,* 203 U. S. 222;
> *Clarke v. McDade,* 165 U. S. 169;
> *U. S. C. A. Title 28, section 344* (b).

The petition is directed to the Superior Court at San Francisco, an inferior court of this State; the petition is based upon the order of said court denying petitioner's discharge on habeas corpus, upon hearing thereon. The highest court of the State of California is the Supreme Court; the next in order of dignity

are the District Court of Appeal and the Superior Court. Each of said courts have the power by express constitutional grant to issue original writs of habeas corpus. (California Constitution, Article VI, sections 1, 4, 4b, 5.)

With reference to the Supreme Court, the pertinent parts of section 4 of Article VI of the State Constitution relating to the issuance of writs of habeas corpus provide:

> "* * * The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and *habeas corpus,* and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the supreme court or before any district court of appeal, or before any justice thereof, or before any superior court in the state, or before any judge thereof."

Successive applications for such writs may be made by the petitioner in each of said courts. The petitioner, upon denial of a discharge on the petition for writ of habeas corpus filed in the Superior Court, could have filed a petition for the same relief upon the same grounds in the District Court of Appeal or the Supreme Court, or in both, in the order of their dignity.

Matter of Perkins, 2 Cal. 424;

Penal Code, section 1475.

In the *Matter of Zany,* 164 Cal. 724, at page 727 it was said, in this connection:

> "* * * Where a petitioner was remanded to custody by a superior court, and the proceeding instituted in that court was thus terminated and was no longer a matter *pending therein,* he could inaugurate a *new proceeding* for relief in another court and can still do so, but is now limited in the making of a new application by statutory provision to a higher court, either the district court of appeal having jurisdiction, or the supreme court. Such was the only remedy afforded by our law to the petitioner when remanded, and, as we have said, a discharge from custody by a superior court was final and conclusive." (Italics by court.)

Section 1475, Penal Code (California Statutes 1907, page 560) recognizes the right of the petitioner on an order of remand in an inferior court to file a new petition in the Supreme Court of this State. The statute simply regulates the procedure in relation to its form and content. A material portion of said section reads as follows:

> "Every application for a writ of habeas corpus must be verified, and shall state whether any prior application or applications have been made for a writ in regard to the same detention or restraint complained of in the application, and if any such prior application or applications have been made the later application must contain a brief statement of all proceedings had therein, or in any of them, to and including the final order or orders made therein, or in any of them, on appeal or otherwise."

While it is true a petitioner, on habeas corpus, may not appeal from an order of remand, he may never-

theless, as indicated, file a petition in the Supreme Court, which petitioner has not done, and until he has filed such petition in the Supreme Court of this State and an adverse decision thereon is rendered, he has no standing on certiorari in this Court.

II.

IT DOES NOT SUFFICIENTLY APPEAR THAT A FEDERAL QUESTION WAS RAISED IN THE STATE COURT.

It does not appear a federal question was properly raised in the State court. A mere general statement in the petition for a writ of habeas corpus filed in the State court that petitioner was taken into custody without due process is insufficient. (R. 2.) Moreover, the police of the State had the power to make the arrest of petitioner without any warrant of arrest.

Stallings v. Splain, 253 U. S. 340;
Burton v. New York Central R.R. Co., 245 U. S. 315, 318;
Day v. Keim, 2 Fed. (2d) 966.

Nor can the certificate of the judge to the record suffice, which simply states certain enumerated constitutional questions were raised, without evidence the same were raised in the pleadings and the hearing of the cause.

Seaboard Air Line Ry. v. Duvall, 225 U. S. 477;
Home for Incurables v. City of New York, 187 U. S. 155;
Henkel v. Cincinnati, 177 U. S. 170.

Nor is it sufficient they were raised in the exceptions to the order or judgment.

Clarke v. McDade, 165 U. S. 168, 172.

III.

THE APPLICATION OF PETITIONER FOR A WRIT OF CERTIORARI DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

This Court may not assume jurisdiction to review the decision of a State court in the absence of a substantial federal question.

Honeyman v. Hanan, 300 U. S. 14, 18;
Whitney v. California, 274 U. S. 357, 360;
Zucht v. King, 260 U. S. 174;
Sugarman v. United States, 249 U. S. 182, 184.

The entry into an asylum State by the officers of another State, under an interstate compact, such as the one here involved, for the purpose of seizure and return of a parolee whose parole has been revoked, is not fundamentally a matter of federal concern. For the protection of its citizens and the enforcement of its penal laws a State has the sovereign right under its reserved police powers to expel from its boundaries criminals or fugitives from justice from another State, without the consent of Congress.

Matter of Perkins, 2 Cal. 424, 436.

The interstate compact under which it was sought to return petitioner to the State of Washington is a reasonable exercise of the police powers of this State,

made necessary for the more effective enforcement of its penal laws. Article I, Section 10, Clause 3 of the Federal Constitution is not applicable to the interstate compact here under consideration; the consent of Congress is required only, notwithstanding the congressional act of June 6, 1934, Chapter 406, Statutes 909, to those interstate compacts which may impinge upon the supremacy of the United States or invade its exclusive domain.

St. Louis and San Francisco Ry. v. James, 161 U. S. 540, 562;
Wharton v. Wise, 153 U. S. 155, 168-170;
59 *Corpus Juris,* page 37, section 13-b.

After holding that the Constitution does not apply to every interstate compact; that there are such as require no congressional consent, this Court in *Virginia v. Tennessee,* 148 U. S. 503, at page 519, said:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States. * * *"

The consent by Congress to the enactment of the California statute, Statutes 1937, page 469, under which the return of the petitioner was sought, did not make the California statute a treaty or statute of the United States.

Hinderlider v. La Plata Co., 304 U. S. 93, 109;
People v. Central Railroad, 12 Wall. 455.

Indeed, the rights and powers reserved to the states under the Tenth Amendment to the United States Constitution included the right to enter into interstate compacts which did not contravene provisions of the Federal Constitution, although such compacts may limit the agreeing states in the exercise of their respective police powers.

United States v. Bekins, 304 U. S. 27, 52.

Nor are interstate compacts for that reason invalid.

Green v. Biddle, 21 U. S. 1.

A parolee is a convict released from imprisonment under certain conditions; the revocation of his parole renders him a fugitive from justice. His rearrest without warrant is not a violation of due process of law.

Ex parte Foster, 61 Pac. (2d) 37, 39.

Upon the revocation of the parole of petitioner there would be no question as to the right of the State of Washington to arrest him, without warrant, within its own boundaries without violating the Federal Constitution. Upon the consent of the State of California, it is difficult to understand why a different rule should apply; that is to say, why the consent of Congress must first be obtained before officers of the State of Washington may arrest petitioner within the boundaries of the State of California. It is an act committed within the State of California affecting the enforcement of its own criminal laws and solely a matter of State concern. To grant such consent to the State of Washington to seize a fugitive from

justice within this State under the circumstances here disclosed is but a reasonable exercise of the police powers of this State.

Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86;

Zucht v. King, supra.

IV.

THE CONGRESSIONAL ACT ENABLING THE STATES TO ENTER INTO COMPACTS IN THE ENFORCEMENT OF THEIR PENAL LAWS, AND THE CALIFORNIA STATUTE ENACTED THEREUNDER, ARE VALID AND VIOLATE NO FEDERAL CONSTITUTIONAL PROVISION.

Assuming the Federal Constitution has been drawn into question by the legislation mentioned in the above caption, still such legislation does not deny any constitutional right or guarantee.

The pertinent parts of the California statute under consideration read:

> "Pursuant to the authority vested in this State by that certain act of Congress, approved June 6, 1934, and entitled, 'An act granting the consent of Congress to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime, and for other purposes', the Governor is hereby authorized and directed to enter into a compact or compacts on behalf of this State with any of the United States legally joining therein."

Subdivision (3) of paragraph 3 of said statute reads:

> "*Retaking probationers or parolees.* That duly accredited officers of a sending State may at all

times enter a receiving State and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from Justice are hereby expressly waived on the part of States party hereto, as to such persons. The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State. If at the time when a State seeks to retake a probationer or parolee there should be pending against him within the receiving State any criminal charge, or he should be suspected of having committed within such State a criminal offense, he shall not be retaken without the consent of the receiving State until discharged from prosecution or from imprisonment for such offense."

(Statutes 1937, page 469; Deering's General Laws, Volume II, page 2732.)

The congressional consent act under which the foregoing statute was enacted reads:

"The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."

(June 6, 1934, c. 406, 48 Stat. 909; U. S. C. A. Title 18, section 420.)

The foregoing congressional consent act was enacted pursuant to the provisions of Article I, Section 10, Clause 3 of the Federal Constitution:

> "No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."
>
> (U. S. C. A., Part 2, page 218.)

At the outset permit us to call to the attention of this Court the fact that upon numerous occasions it has upheld and enforced interstate compacts involving the enforcement of both civil and criminal process, a few of which are here cited:

New Jersey v. Delaware, 291 U. S. 361, 377, 378;
Miller v. McLaughlin, 281 U. S. 261;
Nielson v. Oregon, 212 U. S. 315;
St. Louis and San Francisco Ry. v. James, supra, p. 562;
Wharton v. Wise, supra;
134 A. L. Rep. 1411.

The congressional consent act enacted under the authority of Article I, Section 10, Clause 3 of the Federal Constitution does not violate Article IV, Section 2, Clause 2 of said Constitution, the so-called constitutional extradition provision. This extradition or rendition provision is not self-executing; it was left to Congress to prescribe the proceedings necessary to carry the provisions of the article into effect.

Roberts v. Reilly, 116 U. S. 80, 94;
Kentucky v. Dennison, 24 How. 66, 104.

The aim of the constitutional provision was to prevent the successful escape of persons charged with, or convicted of, the commission of crime by fleeing the boundaries of the State where they were charged or convicted.

Ex parte Anthony, 87 Pac. (2d) 302.

No comity exists between the States for the rendition of fugitives from justice.

Mahon v. Justice, 127 U. S. 700.

The constituted authorities of one State could not pursue a fleeing felon into another State in the absence of the consent of the asylum State, without committing a breach of its sovereignty; hence these federal rendition laws. If, as indicated, the duty rested with Congress to prescribe the requisite procedure to carry into effect this constitutional provision, it must follow its character and essentials were left to Congress, which could at will alter, amend, or create new methods or permit the States to enter into compacts with each other to attain the same end. This permission given the States to enter into such compacts was inevitable. The procedure set forth under the congressional act (U. S. C. A., Title 18, section 662; R. S. 5278) necessary to effect rendition of interstate fugitives from justice proved cumbersome, uncertain and in instances ineffective. While a duty rested upon the executive authority of the asylum State, under proper rendition proceedings, to deliver up the fugitive to the demanding State, there was no method of its enforcement.

Mahon v. Justice, supra, page 715;
Taylor v. Taintor, 83 U. S. 366, 374;
Kentucky v. Dennison, 24 How. 66.

In giving Congress the authority to prescribe the procedure in rendition proceedings under the Federal Constitution, it must be assumed the authority granted embraced all necessary means to make effective the objects of the constitutional provision, and that the consent legislation, aside from its authority under Article I, Section 10, Clause 3, of the Constitution, was within the contemplation of the constitutional rendition provision.

The petitioner is a fugitive from justice, being a parolee whose parole has been revoked. Under such circumstances no warrant of arrest is essential under the rendition laws.

Ex parte Foster, 61 Pac. (2d) 37, 39;
Brown v. Lowry, 195 S. E. 759 (Ga.);
In re McBride, 101 Cal. App. 201, 256.

And the question as to the merits of the revocation of his parole is a matter for the courts of the State of Washington to decide.

Ex parte Foster, supra.

CONCLUSION.

Due to the uncertainties and delays occasioned in the interstate pursuit of criminals under the rendition laws of the United States, there has been considerable agitation for a more effective method to attain this end, in which Congress has given encouraging legislation. It has been the subject of considerable discussion in collegiate periodicals and as a result a uniform act was formulated for adoption by the States, designed to accomplish more effective super-

vision of out-of-state parolees. This act prior to 1940 was adopted by the legislatures of some twenty-nine States, including the State of California, which adopted it in 1937, and which act is here under attack by petitioner. A review of the constitutional provision, with respect to interstate rendition of fugitives from justice, does not warrant the conclusion it is exclusive, nor did the congressional legislation enacted thereunder lead to any such inference. However, in addition to the grounds assigned in our brief, the constitutionality of the congressional act may be supported under the police powers of Congress in interstate commerce, for the purpose of making more effective the penal laws of the various States. (*Brooks v. United States,* 267 U. S. 432, 426.)

It is submitted the petition for writ of certiorari herein should be denied.

Dated, San Francisco, California,
December 1, 1941.

Respectfully submitted,

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